

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

SEARS HOLDINGS CORPORATION, *et al.*,
Debtors.

Chapter 11

Case No. 18-23538 (RDD)
(Jointly Administered)

**DECLARATION OF STEVEN BISSELL IN SUPPORT OF
MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

I, Steven Bissell, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury as follows:

1. I am a Managing Director of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the “Monitor”) of Sears Canada Inc. (“Sears Canada”) and certain of its affiliates, and have the full authority of the Monitor to make this declaration in support of the *Motion for Relief from the Automatic Stay for the Purpose of Joining Sears Holdings Corporation as a Defendant in Existing Litigation Pending before the Ontario Superior Court of Justice (Commercial List) and to Liquidate Certain Claims against Sears Holdings Corporation in such Existing Litigation* (the “Lift Stay Motion”) filed contemporaneously herewith.

2. This declaration is comprised of statements of legal opinion and statements of fact. Where the matters stated in this declaration are statements of legal opinion, such statements represent my understanding of applicable law based on my discussions with the Monitor’s counsel. Where the matters stated in this declaration are statements of fact that are within my personal knowledge, they are true. Where the matters stated in this declaration are statements of fact that are not within my personal knowledge, they are true to the best of my knowledge, information, and belief.

BACKGROUND

I. The Relationship between Sears Canada and the U.S. Debtors

3. From the early 1950s until it ceased operations in early 2018, Sears Canada was a participant in the Canadian retail market. Throughout that period, it operated from a head office located in Toronto, Ontario. Although Sears Canada was a publicly traded company, I believe that, based upon publicly available disclosures by Sears Holdings Corporation (“Sears Holdings”) and Sears Canada, Sears Holdings beneficially owned a majority of the shares in Sears Canada in November and December 2013. Based upon publicly available disclosures by Sears Holdings, I believe Sears Holdings, in turn, was controlled at those times by Edward S. Lampert (“Lampert”) and his various funds, ESL Investments Inc.; ESL Partners, LP; SPE I Partners, LP; SPE Master I, LP; and ESL Institutional Partners, LP, among others (collectively, “ESL”).

II. Sears Canada’s Financial Performance and the 2013 Dividend

4. From 2011 onward, according to publicly available financial disclosures, the financial performance of Sears Canada declined sharply. Over the next several years, Sears Canada’s revenues and gross margins fell, and operating losses mounted. Materials prepared by and/or reviewed by Sears Canada’s management during that period indicated that drastic, transformative action would be required for Sears Canada to transform its business and reestablish itself as a successful retailer.

5. On September 23, 2013, the board of directors of Sears Canada received a series of management presentations directly addressing Sears Canada’s operational and financial performance (the “2013 Board Presentations”). Among other things, the 2013 Board Presentations reported that:

- sales continued to decline across Sears Canada's business;
- based on year-to-date current trends, Sears Canada's projected EBITDA by 2016 would be negative CAD105 million; and
- Sears Canada was struggling operationally.

6. On November 18, 2013, the board of directors of Sears Canada unanimously resolved to declare an extraordinary dividend of CAD5.00 per common share, for an aggregate dividend payment of approximately CAD509 million (the "2013 Dividend").

7. Based upon publicly available disclosures about the shareholdings of ESL, Lampert, and Sears Holdings at the relevant time, the Monitor believes that as a result of the 2013 Dividend, Sears Holdings was paid approximately CAD259 million, while ESL and Lampert were paid an aggregate amount of approximately CAD140.9 million.

III. The Canadian Insolvency Proceedings

8. On June 22, 2017, Sears Canada and certain affiliates (collectively, the "Canadian Debtors")¹ sought and obtained an order (the "June 22 Order"), a true and correct copy of which is annexed hereto as Exhibit A, from the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court") in connection with the commencement of insolvency proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (as amended, the "CCAA"). Pursuant to the June 22 Order, the Canadian Court, among other things, appointed the Monitor to monitor the business and financial affairs of the Canadian Debtors.

¹ The Canadian Debtors are: Sears Canada; 9370-2751 Quebec Inc.; 191020 Canada Inc.; The Cut Inc.; Sears Contact Services Inc.; Initium Logistics Services Inc.; 9845488 Canada Inc.; Initium Trading and Sourcing Corp.; Sears Floor Covering Centres Inc.; 173470 Canada Inc.; 2497089 Ontario Inc.; 6988741 Canada Inc.; 10011711 Canada Inc.; 1592580 Ontario Limited; 955041 Alberta Ltd.; 4201531 Canada Inc.; 168886 Canada Inc.; and 3339611 Canada Inc.

9. On July 13, 2017, the Canadian Court issued the Amended and Restated Initial Order (the “Restated Order,” together with the June 22 Order, the “Initial Order”), a true and correct copy of which is annexed hereto as Exhibit B.

10. Following entry of the Initial Order, the Canadian Debtors, including Sears Canada, liquidated substantially all of their assets, except certain real property and litigation claims, and ceased their ordinary course business operations. The Canadian Debtors’ only remaining material asset, other than the litigation claims discussed below, that has not been sold is a single real estate asset. The Canadian Court issued its Governance Protocol and Stay Extension Order (the “Governance Order”) on December 3, 2018, a true and correct copy of which is annexed hereto as Exhibit C, pursuant to which the Monitor is overseeing the remaining wind-down of the Canadian Debtors. The Monitor is an officer of the Canadian Court with respect to the performance of its duties.

11. On March 2, 2018, the Canadian Court issued an order (as amended on April 26, 2018, the “Litigation Investigator Order”) appointing Lax O’Sullivan Lisus Gottlieb LLP as litigation investigator (the “Litigation Investigator”), with a mandate to identify and report on any rights or claims that the Canadian Debtors and/or any creditors of the Canadian Debtors may have against any parties. Further, the Litigation Investigator Order established a creditors’ committee to consult with the Litigation Investigator. A true and correct copy of the Litigation Investigator Order is annexed hereto as Exhibit D.

CLAIMS AGAINST ESL AND LAMPERT

12. The Monitor and the Litigation Investigator, in accordance with their duties, reviewed certain material transactions, payments, and dividends entered into, made, or declared by the Canadian Debtors in the period prior to their filing for protection under the CCAA. Based

upon their review, on November 5, 2018, the Monitor and the Litigation Investigator issued their respective reports concluding that the estates of the Canadian Debtors and Morneau Shepell Ltd. (the “Plan Administrator”) in its capacity as administrator of the Sears Canada Registered Pension Plan (the “Canadian Plan”) should pursue, among other things, claims against Lampert and ESL arising from the 2013 Dividend paid to Sears Canada’s shareholders on December 6, 2013 (a majority of which appears to have been received directly or indirectly by Lampert, ESL, and Sears Holdings). At that time, the Monitor reported that it would provide a further update at a later date regarding any similar claim that it may seek to pursue against Sears Holdings after further review of the implications of the Sears Holdings bankruptcy proceedings.

13. Upon the request of the Litigation Investigator, supported by a report by the Litigation Investigator recommending the pursuit of certain claims, on December 3, 2018, the Canadian Court issued an order (the “Litigation Trustee Order”) terminating the appointment of the Litigation Investigator, and appointing the Honorable Douglas Cunningham, Q.C. as the litigation trustee (the “Litigation Trustee”) to carry out all actions necessary to prosecute claims identified by the Litigation Investigator in its report. A true and correct copy of the Litigation Trustee Order is annexed hereto as Exhibit E.

14. On December 3, 2018, the Canadian Court also issued the Transfer at Undervalue Proceeding Approval Order (the “TUV Order”). A true and correct copy of the TUV Order is annexed hereto as Exhibit F. Pursuant to the TUV Order, the Monitor was authorized to pursue a claim against Lampert, ESL and certain former directors of Sears Canada relating to the 2013 Dividend.

15. On December 19, 2018, as authorized by the Canadian Court, the Monitor, the Litigation Trustee, and the Plan Administrator issued the following claims in Canada:

- a Statement of Claim by the Monitor against ESL Investments Inc.; ESL Partners, LP; SPE I Partners, LP; SPE Master I, LP; ESL Institutional Partners, LP; Edward Lampert; William Harker; and William Crowley under Court File No. CV-18-00611219-00CL (the “Monitor Action”);
- a Statement of Claim by Sears Canada Inc., through the Litigation Trustee, against ESL Investments Inc.; ESL Partners, LP; SPE I Partners, LP; SPE Master I, LP; ESL Institutional Partners, LP; Edward Lampert; Ephraim J. Bird; Douglas Campbell; William Crowley; William Harker; R. Raja Khanna; James McBurney; Deborah Rosati; and Donald Ross under Court File No. CV-18-00611214-00CL (the “Litigation Trustee Action”); and
- a Statement of Claim by Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan, against ESL Investments Inc.; ESL Partners, LP; SPE I Partners, LP; SPE Master I, LP; ESL Institutional Partners, LP; Edward S. Lampert; William Harker; William Crowley; Donald Campbell Ross; Ephraim J. Bird; Deborah E. Rosati; R. Raja Khanna; James McBurney; and Douglas Campbell under Court File No. CV-18-00611217-00CL (the “Plan Administrator Action”).

Copies of the foregoing statement of claims are annexed hereto as Exhibits G, H, and I, respectively.

16. These three actions are being case-managed by the Canadian Court together with the action previously commenced on October 21, 2015 by 1291079 Ontario Limited as the class representative for the potential class of Sears Hometown Dealer stores (the “Class Action Representative”) by Statement of Claim against Sears Canada Inc., Sears Holdings Corporation, ESL Investments Inc., William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney, and Douglas Campbell under Court File Number 4114/15 (the “Class Action,” and collectively with the Monitor Action, the Litigation Trustee Action, and the Plan Administrator Action, the “Canadian Litigation”). A copy of the Class Action statement of claim, as amended, is annexed hereto as Exhibit J.

17. None of Sears Holdings or its affiliates that are debtors in the Chapter 11 cases have yet been named as a defendant in the Canadian Litigation, with the exception of the Class

Action, which was commenced, and included Sears Holdings as a defendant, prior to Sears Holdings filing its bankruptcy petition with this Court.² Further, each of the Monitor, the Litigation Trustee, and the Plan Administrator have prepared proposed amended statements of claim to be issued in the event that the relief requested in the Lift Stay Motion is granted; blacklines showing changes against the as-filed statements of claim are annexed hereto as Exhibits K, L, and M, respectively.³

STATUS OF THE CANADIAN LITIGATION

18. In February 2019, ESL, Lampert, and certain former directors of Sears Canada filed motions seeking pre-pleading production of documents and particulars in connection with the Litigation Trustee Action and the Monitor Action. The motions were heard during the week of March 18, 2019 and the Canadian Court dismissed those motions. On March 18, 2019, the same defendants filed motions to strike portions of the Litigation Trustee's claims. The motions are currently pending and scheduled to be heard on April 17 and 18, 2019.⁴ The case management judge managing all of the Canadian Litigation has directed that statements of defence as to all four actions are due by May 3, 2019.

19. In addition, the parties have conducted several case conferences and there has been a preliminary delivery of limited documents to the defendants in the Canadian Litigation.

² In recognition of principles of comity and the automatic stay imposed by the commencement of Sears Holdings' chapter 11 case, the Monitor, the Litigation Trustee, and the Plan Administrator did not immediately bring suit against Sears Holdings.

³ A proposed amended statement of claim for the Class Action is not attached as the Class Action Representative already named Sears Holdings as a defendant prior to the commencement of Sears Holdings' chapter 11 case.

⁴ The Class Action Representative's motion to certify the Class is also scheduled to be heard on April 17 and 18, 2019.

The parties have been directed to complete their production of documents by June 30, 2019, oral examinations for discovery are tentatively scheduled for September 2019, and a joint trial is currently scheduled to begin on February 3, 2020.

PROOFS OF CLAIM AGAINST SEARS HOLDINGS

20. Under compulsion of this Court's *Order (I) Establishing Deadline to File Proofs of Claim and Procedures Relating Thereto, (II) Approving the Form and Manner of Notice Thereof, (III) Approving Procedures for the Resolution of Claims Asserted Pursuant to 11 U.S.C. § 503(B)(9), and (IV) Prohibiting Vendors from Pursuing Such Claims Outside the Procedures* [Docket No. 2676], the Monitor, the Litigation Trustee, the Plan Administrator, and the Class Action Representative (collectively, the "Canadian Plaintiffs") each filed separate proofs of claim against Sears Holdings bearing claim nos. 16269, 16809, 16293, and 17179, respectively, in connection with Sears Holdings' joint and several liability to the Canadian Plaintiffs on account of the 2013 Dividend.

IN WITNESS WHEREOF, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 16th day of April 2019.


Steven Bissell
Managing Director